NO. 80 - 275

Supreme Court, U.S.
FILED
SEP 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT MICHAEL DAVIS, ET AL.
Petitioners,

VERSUS

LEWIS WILLIAMS, ET AL.
Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENTS

QUESTIONS PRESENTED

That a certain provision proscribing "Conduct Prejudicial to Good Order" is not void and facially - always and however applied - invalid.

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The Respondents herein respectfully request that this court deny the petition for writ of certiorari, seeking review of the 16 - 7 en banc decision of the Fifth Circuit and Respondents hereby submit a short, concise basis for such a denial.

STATEMENT OF THE CASE

Petitioners seek to invoke the discretionary jurisdiction of this Honorable Court to obtain an advisory opinion on an academic question. Neither of the individuals involved originally are currently involved. Respondent Williams, the fire chief who sought Petitioner Davis' dismissal, has been replaced and Petitioner Davis has voluntarily left the Fire Department to pursue his career as a home builder.

The issue to be reviewed by the Fifth Circuit was limited to the narrow question of whether the specific language involved was facially unconstitutional. That issue having been resolved in favor of the validity of the language, any real controversy of public importance has left the case.

Respondents approve of the fact statement contained in the majority opinion issued by the Fifth Circuit but would emphasize that those facts are not before this Court. The only question decided by the Fifth Circuit was the facial validity of "conduct prejudicial to good order." That is, that such language is not always and however applied invalid.

REASONS FOR DENYING WRIT

DECISION OF FIFTH CIRCUIT IS CORRECT

This Court's decision in *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed 2d 15 (1974) dealt with the discharge of a non-military employee of the government whose continued employment was protected by the provisions of the Lloyd-LaFollette Act 5 U.S.C. Sec. 7501. The case at bar likewise deals with the discharge of an employee whose continued employment was protected by statute. See Article 1269m V.A. T.S. It is the virtually identical language used to support the respective discharges that makes *Arnett* so closely analogous.

"Such cause as will promote the efficiency of the service" governing federal employee dismissals under the Lloyd-La-Follette Act is seen by Petitioners as being supplemented by the regulations of the Civil Service Commission and by the regulations and instructions of the particular agency involved, thereby distinguishing *Arnett*, supra, from the case at bar. Such is simply not true.

Arnett at footnotes 5 and 6 quote the following regulations:

> "An employee shall not engage in criminal, infamous, dishonest, immoral or notoriously disgraceful conduct or OTHER CONDUCT PREJUDICIAL TO THE GOVERNMENT." 5 C.F.R. Section 735.209 (Emphasis added)
>
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Common to each of the quoted regulations and to the case at bar is the "CONDUCT PREJUDICAL" language. *Arnett* therefor is strong, direct authority that the language used to protect Irving Fire Department employees from groundless discharge is a sufficient statement of regulated conduct, as the Fifth Circuit recognized.

Arnett v. Kennedy, supra, has been cited and followed by the Texas Appellate Courts who are the principal expositors of state law. *Moore v. Sims*, 442 U.S. 415, 99 S. Ct. 2371, 60 L. Ed 2d 994 (1979). In *City of Wichita Falls v. Fowler* 555 S. W. 2d 920 (Tex. Civ. App. – Ft. Worth), no writ history, the Court reasoned that *Parker v. Levy* 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed 2d 439 (1974) and *Arnett*, supra, were controlling and denied the fireman's challenge of the identical language involved in the case at bar.

This same language again came before the Texas Appellate Courts in *City of Lubbock v. Estrello*, 581 S.W. 2d 288 (Tex. Civ. App. – Amarillo 1979) writ refused no reversible error. Again the "conduct prejudicial to good order" regulation was upheld. See also *City of Wichita Falls v. Harris*, 532 S. W. 2d 653 (Tex. Civ. App. – Ft. Worth, 1976) writ refused no reversible error, and *Bolieu v. Firemen's and Policemen's Civil Service Commission*, 330 S. W. 2d 234, 236 (Tex. Civ. App. – San Antonio 1959) writ refused no reversible error, each upholding the validity of the provision at issue in the case at bar.

The Fifth Circuit correctly notes that *Arnett*, supra, and *Parker*, supra, both well reasoned decisions of this Honorable Court, have set the limits within which the case at bar clearly falls. *Arnett* on one end of the scale upholds the discharge of an OEO civilian employee and *Parker* on the other end of the scale upholds the discharge of military personnel.

Petitioner Davis was not a soldier, nor was he a mere civilian

employee. There seems to be some reluctance to call the Irving Fire Department "quasi-military" but by whatever name it is described, the need for esprit de corps and discipline within the department clearly brings this case somewhere inside the "book-end" decisions of *Arnett* and *Parker*.

It was dramically noted during oral argument before the en banc Fifth Circuit Court that the United States Constitution, the instrument being used to challenge the language involved, employs at Article III Sec. 1, what could be considered a far more general description of conduct to be expected of members of the federal Judiciary: "The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behavior. . . ." Are we to say in light of Article III Sec. 1 that the Constitution somehow requires this Court to declare "conduct prejudicial to good order" facially-always and however applied-invalid?

ISSUES INVOLVED ARE NOT "CERTWORTHY"

As stated previously Petitioners seek an advisory opinion on an academic question. The case no longer contains any live issues in that the *former* fireman affected by the action of the *former* fire chief has no continuing interest in the case and has no interest in even any future, imagined action of the present fire chief.

Petitioners hold up but one, six year old decision from the Seventh Circuit which invalidated certain other language as that language was used to regulate the conduct of policemen in Milwaukee. The issues involved there were, subsequent to *Arnett*, supra, and *Parker*, supra, determined not to be "certworthy." *Bence v. Breier*, 501 F. 2d 1185 (7th Cir. 1974) cert. denied, 419 U.S. 1121, 95 S. Ct. 804, 42 L. Ed. 2d 821 (1975).

That one Seventh Circuit decision has also been discredited

by subsequent Circuit Court opinions. See *Byrd v. Gain* 558 F. 2d 553 (9th Cir. 1977) and *Kannisto v. City and County of San Francisco*, 541 F. 2d 841 (9th Cir. 1976) certiorari denied 430 U.S. 931, 97 S. Ct. 1552, 51 L. Ed 2d 775 (1977) both upholding similar regulations dealing with policemen in San Francisco, and *Janusaitis v. Middlebury Volunteer Fire Department*, 607 F. 2d 17 (2nd Cir. 1979) upholding the dismissal of a fireman in Connecticut. Each of these decisions uphold general statements of proscribed conduct and certiorari was denied in the only case in which it was applied for.

The denial of certiorari in *Bence*, supra, and the denial of certiorari in *Kannisto*, supra, are strong indications that the issue in the case at bar, particularly where such is devoid of any question as to the proper application of the language involved, is not of such compelling interest that the Supreme Court should exercise the jurisdiction which has been reserved for deciding questions of significant public interest and importance.

ABSTENTION

Although Petitioners allege a conflict of decisions between the various circuit courts, the conflict, if any, could well remain unresolved if this Honorable Court correctly analyzes the course of events that led this case into the federal court system.

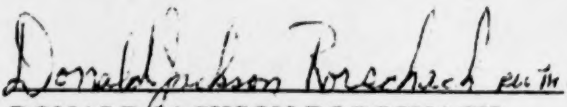
Petitioner Davis, an employee whose continued employment was protected by regulations promulgated pursuant to a *state* statute appealed his discharge to the Irving Civil Service Commission and to the *state* courts pursuant to the mandate of the *state* statute. According to a very recent restatement of the abstention doctrine Davis should not be in federal court. See *Moore v. Sims*, supra. As stated in *Moore*, the federal courts should not exert jurisdiction if the plaintiffs "had an *opportunity* to present their federal claims in the state proceeding." *Moore*, supra at 442 U.S. 425, 99 S. Ct. _____, 60 L. Ed 2d

1004, quoting from *Juidice v. Vail* 430 U.S. 327, 337, 97 S. Ct. 1211, 51 L. Ed 2d 376 (1977) (emphasis in original). Davis clearly had such an opportunity and did in fact assert his federal claim in the state courts. If this Honorable Court sees this as a basis for deciding the rights of these litigants, any alleged conflict of decisions would go unchanged. If the conflict would never be reached, it is difficult to see how that conflict can be the basis for invoking this Court's discretionary jurisdiction.

CONCLUSION

For these reasons the petition for writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief in Opposition has been deposited, postage paid, in the United States Mail addressed to Petitioner as follows:

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